

very least until the customer is no longer a customer. Consequently, on reconsideration, the Commission should clarify that CMRS providers can use CPNI to retain or regain a customer.

The Commission also should clarify its definition of CPNI to exclude employee knowledge of a specific customer. A problem with the rule as currently framed is that it requires CMRS employees (and potentially agents) not to know information they inherently know from working for a CMRS provider: the identity of large clients and the attributes of these significant accounts. Without accessing customer CPNI, many account representatives have a significant amount of institutional knowledge gained from, in some cases, years of working on the same customer account. This institutional knowledge does not disappear if a customer leaves. Consequently, attempting to remarket to a large former account could be deemed restricted use of CPNI even when no CPNI was used. CMRS account representatives should not be found to have violated the Commission's rules if they remarket former accounts on this basis. On reconsideration, the Commission should make plain that the definition of CPNI does not encompass the generalized information naturally gained by account representatives or agents during the course of their employment.

The Commission also should clarify the meaning of language in Section 64.2005(b)(3) addressing the circumstances where a customer has "switched to another service provider." Because the Commission has determined that there are three specific telecommunications service categories, the rule needs to address whether switching is meant to be applicable only within a service category, such as when a customer switches between CMRS providers, or whether it is meant to include situations such as switching from a landline LEC to a CMRS provider. If the rule is to apply at all, it should apply to all customer-carrier changes, including customers that switch from landline to wireless service.

B. Fraud Prevention Programs Should Be Permitted to Use CPNI

Given the CMRS industry's need to prevent fraudulent calling, there is relatively constant monitoring of network usage to detect unusual calling patterns. While carriers attempt to review data promptly, there could be instances where customer CPNI is being reviewed for possible fraud after a customer has terminated service. On reconsideration, therefore, the Commission should clarify in its rules that CPNI information gathered as part of a fraud prevention program can be used by carriers. While Section 222 itself appears to cover this circumstance, it would be helpful to have a Commission rule to this effect.

IV. THE "TOTAL SERVICE" APPROACH CREATES UNIQUE COMPETITIVE ADVANTAGES FOR ILECs OPERATING IN NON-COMPETITIVE MARKETS

The Commission chose a "total service" approach to CPNI regulation as a compromise among several alternatives. The first approach was a "simple category" approach, which would have permitted broad information sharing. The Commission rejected this approach, fearing that it would make CPNI regulation and Section 222 meaningless.^{42/} Another approach, the "discrete offering" approach, the Commission rejected because it was considered too narrow to promote competition among industry participants.^{43/} The "total service" approach reflects a compromise between these extremes.

^{42/} Order at ¶ 33. Under the single category approach, CPNI derived from a carrier's provision of any telecommunications service could be used to market any other telecommunications service offered by the carrier or its affiliates.

^{43/} Under the discrete offering approach, CPNI derived from a discrete offering may be used only with respect to that discrete regulated offering or feature of service.

A. The "Total Service" Approach Is Ill-Suited for Application Between Competitive and Non-Competitive Markets

The "total service" approach allows carriers to share CPNI for marketing purposes across all regulated offerings and service categories subscribed to by a customer from a carrier and its affiliates.^{44/} The Commission describes the "total service" approach as flexible and subject to expansion with developing technologies.^{45/} However, even if a "total service" analysis is desirable in defining the scope of elements included in common CMRS services rendered to customers, it still is ill-suited for application between competitive and non-competitive markets.

Commissioner Ness, in her partial dissent to the *Order*, presents two compelling examples of how the total service approach will favor incumbent LECs:^{46/}

If MCI, AT&T, or any one of a hundred other long distance companies successfully wins the interLATA business of a customer, it does not automatically acquire the right and the opportunity to access the customer's *local* service information. Yet, under the approach adopted by the majority today, if the structurally separated affiliate of a Bell operating company wins the interLATA business of a customer, it *does* automatically acquire the right and the opportunity to access the customer's local service information. I don't think this discrepancy is what Congress intended.

Consider another example. Under Section 272(g)(1), the structurally separate affiliate may market the local service offerings of its affiliated operating company, provided that other entities may also do so. So, if a Bell operating

^{44/} Under the "total service" approach, carriers may share CPNI among all regulated telecommunications offerings subscribed to by a customer. *Order* at ¶ 30.

^{45/} *Id.* at ¶ 58. Comcast takes issue with this view for a number of reasons but most significantly because the "total service" approach as currently defined by the Commission is out of step with existing technological realities with respect to CMRS transmission and CMRS CPE.

^{46/} While these examples are not CMRS specific, the potential harm to CMRS providers exceeds that which interexchange carriers would suffer because many CMRS carriers provide niche services or CMRS-only services and do not have multiple telecommunications affiliates with CPNI that they can freely access. In other words, the rules discriminate in favor of multi-service providers by permitting not just bundling of separate services but also CPNI sharing among separate services and among "affiliates" (a term that could encompass a myriad of business relationships about which customers may be completely ignorant).

company's structurally separated affiliate successfully markets a local service offering of the operating company (say, in selling the customer a second line), the majority's approach would say that the separate affiliate now has the right automatically to access the operating company's entire record on the customer for the purpose of marketing additional services. But if an unaffiliated entity, exercising the same right to sell the same service on behalf of the same operating company, successfully sells the operating company's local service, it does not acquire the same rights. Again, the result is anomalous.^{47/}

In the CMRS market, the competitive dynamic Commissioner Ness describes would manifest itself through ILECs with CMRS affiliates. Obviously, ILECs with CMRS affiliates have a significant marketing advantage over non-affiliated CMRS providers in retaining existing CMRS customers. A less obvious but equally egregious effect of the Commission's regulatory framework is that an ILEC with a CMRS affiliate that obtains a general customer approval for CPNI use may automatically use that approval to market CMRS and any other services or products offered by it, its CMRS affiliate, or its other affiliates. ILECs offering many telecommunications services will have tentacles grasping CPNI from all of their services and affiliates and will have an enormous and perhaps insurmountable marketing advantage over smaller and mid-sized carriers.^{48/}

The need to rectify this problem cannot be overstated, given that it threatens to entrench the same monopoly dominated structure that the Commission has struggled over the years to effectively regulate. The RBOCs and every large ILEC retain a near monopoly on their landline customers. They have customers not because of any unique business savvy, but rather due to

^{47/} Order, Statement of Commissioner Susan Ness Dissenting in Part at 2.

^{48/} The Commission recently concluded that ILEC-CMRS safeguards were necessary and appropriate given the ILECs' ability and incentive to block the development of inter-modal competition. See Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services; Implementation of Section 601(d) of the Telecommunications Act of 1996, *Report and Order*, WT Docket No. 96-162 (released October 3, 1997). It would be inconsistent and inimical to the same goals were the agency to overlook the anticompetitive aspects of a total service approach that includes monopoly service within its scope.

their preexisting local exchange monopolies. The Commission simply cannot permit ILECs to capitalize on local exchange CPNI in a "total service" relationship when the ILEC's access to that CPNI evolved through a regulated monopoly rather than by a customer's free choice.

Likewise, it is presumptuous to assume that customers of ILECs, due to a customer-carrier relationship that arose out of necessity and a lack of choice, authorize or expect their CPNI to be shared with known and unknown ILEC affiliates. The fact that an ILEC customer agrees to the ILEC's use of CPNI does not evidence the customer's intent to have that CPNI disseminated to ILEC affiliates for their marketing purposes. In seeking an improved local exchange service package from the only available provider, it is no surprise that a customer would authorize that provider to use information already in the provider's possession. Yet, the customer may be unaware of the implications of a general authorization or of the application for which the CPNI will be used. Given the sophistication of ILEC operations and the growing list of entities with whom ILECs are establishing business affiliations, it seems more reasonable to imply a lack of consent that ILECs be permitted access to the CPNI of their affiliates operating in more competitive portions of the telecommunications marketplace.

For example, at least two RBOCs have announced so called "teaming" arrangements that will enable them to circumvent, to a degree, the statutory preconditions on their entry into interLATA interexchange markets.^{49/} Will the RBOCs consider their IXC team members as affiliates under the Commission's CPNI rules, which could result in a sharing of CPNI between the ILEC and the IXC? The BOCs are banned from the interLATA market until they have demonstrated to the Commission's satisfaction compliance with Section 271's competitive

^{49/} See, e.g., John K. Keller and Stephanie N. Mehta, *U S West Strikes Marketing Alliance With Qwest in Bold Move Skirting Rules*, WALL ST. J., May 7, 1998 at A1. Ameritech reportedly has struck a similar deal with Qwest.

checklist requirements.⁵⁰ The Commission should make clear that a teaming affiliation of the type recently announced, if otherwise permitted, would not authorize sharing of customer CPNI.

The Commission also must address the anomaly of monopoly local exchange market CPNI. Use of this CPNI can provide an incredible advantage to an RBOC in designing new programs in comparison to non-affiliated competitors. By virtue of the use the Commission has permitted ILECs to make of customer CPNI, only the ILEC will know when a customer is ripe to be approached to sell an ISDN service, a second phone line or a "DSL Solution," all of which could be provided competitively. This places CLECs or other competitive providers in a far worse position than the ILEC and it is purely based in the ILEC's monopoly position.

Throughout the *Order* it is evident that the Commission recognizes that combined service CPNI is a powerful marketing asset. Thus, it is puzzling that the Commission could so wholly ignore the adverse competitive impact its rules will have on small and medium size CMRS carriers (and CLECs for that matter) and the overwhelming competitive advantage the rules will bestow upon ILECs. The only rationale stated in the *Order* for imposing rules that create such inequity is that the Commission believes adequate safeguards have been provided to prevent anticompetitive behavior.⁵¹

The Commission's actions in the *Order* undermine the assumption that safeguards are adequate to avert anticompetitive behavior. This is so largely because the *Order* eliminates Section 22.903(f), the primary safeguard from abusive ILEC/CMRS affiliate practices. Without Section 22.903(f)'s restrictions on sharing of CPNI between the ILEC and its CMRS affiliate, there simply is no rule that safeguards non-affiliated CMRS providers by allowing them access

⁵⁰/ 47 U.S.C. § 271(c)(2)(B).

⁵¹/ *Order* at ¶ 59.

to CPNI if it is disclosed to the ILEC/CMRS affiliate. The Commission cannot credibly claim that adequate safeguards exist when, in the same Order, it eliminates the sole remaining rule requiring some evenhandedness in ILEC dealings between CMRS affiliates and non-affiliates on matters of CPNI use.

B. There Is No Compelling Statutory Justification for the Commission to Permit ILEC Affiliate Sharing of CPNI Rights Gained in a Non-Competitive Monopoly Telecommunications Environment

Leaving aside the burden that the CPNI rules will impose on competitors and competition in the CMRS market, there is no compelling statutory justification for the Commission to permit CPNI rights gained in a non-competitive monopoly telecommunications environment to be combined and used against competitors armed with sparse (and strictly regulated use of) CPNI gained in the provision of competitive telecommunications services.^{52/} Thus, the Commission should narrow the "total service" approach so that it does not extend to the CPNI gained by an ILEC while the ILEC operates in a monopoly environment.

The 1996 Act and the 1993 Budget Act are replete with instances where Congress differentiated the rights and obligations of telecommunications carriers. As previously noted, the Commission similarly has made distinctions in appropriate instances where its concerns were not fanciful and the historic development of a particular industry segment warranted different treatment.^{53/} Accordingly, the Commission should reconsider and revise its CPNI rules to address effectively the advantages that the CPNI total service approach bestows upon ILECs. The Commission should restrict the ILEC's use of CPNI.

^{52/} Indeed, given the emphasis of the 1996 Act on encouraging competition, the statutory authority runs counter to the Commission's actions.

^{53/} See, e.g., *supra* note 15.

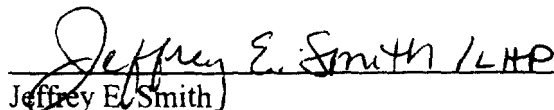
The Commission, of course, would retain the discretion to relax any restriction designed for monopoly providers at an appropriate time in the future when local exchange competition thrives. Nonetheless, logic dictates that an RBOC at least would be prohibited from sharing ILEC-generated CPNI with its affiliates until it has received a favorable Section 271 finding in a given state and by the Commission. More realistically, a CPNI restriction should be imposed for a time thereafter until a measurable level of *sustainable*, facilities-based competition develops.

V. CONCLUSION

Only by recognizing and addressing the differences among telecommunications industry segments can the Commission adopt rules that strike the Congressionally intended balance among competition, customer convenience and protection of sensitive customer information. Comcast respectfully requests that the Commission reconsider critical aspects of the *Order* that prohibit use of CPNI for marketing CMRS CPE and information services, that prohibit use of CPNI by CMRS providers to retain and regain former customers, and that allow ILECs to use the CPNI of their affiliates in more competitive markets to subvert competition.

Respectfully submitted,

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May 26, 1998

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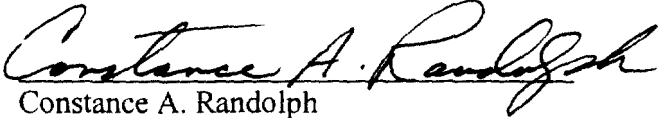
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